

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND  
UNITED STATES DEPARTMENT OF JUSTICE  
MODEL CERCLA PERIPHERAL PARTY CASHOUT CONSENT DECREE**

[NOTE: This Model CERCLA Peripheral Party Cashout Consent Decree is designed to be used in conjunction with the “Guidance on Administrative Response Cost Settlements under Section 122(h) of CERCLA and Administrative Cashout Settlements with Peripheral Parties under Section 122(h) of CERCLA and Attorney General Authority” (signed September 30, 1998; corrected copy issued December 22, 1998). This Section 122(h) guidance describes appropriate candidates for peripheral party cashouts (in Subsection II.B.3.a), outlines the basic terms of such settlements (in Subsections II.B.3.b and II.C), and explains when such settlements should be embodied in a judicially-approved consent decree rather than in an administrative settlement (in Subsection II.B.3.a).]

Date of Issuance: January 11, 2001

This model and any internal procedures adopted for its implementation and use are intended as guidance for employees of the U.S. Department of Justice and the U.S. Environmental Protection Agency. They do not constitute rulemaking by the Department or Agency and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Department or Agency may take action at variance with this model or its internal implementing procedures.

## MODEL CERCLA PERIPHERAL PARTY CASHOUT CONSENT DECREE

### TABLE OF CONTENTS

I.	<u>BACKGROUND</u> . . . . .	3
II.	<u>JURISDICTION</u> . . . . .	4
III.	<u>PARTIES BOUND</u> . . . . .	4
IV.	<u>DEFINITIONS</u> . . . . .	4
V.	<u>STATEMENT OF PURPOSE</u> . . . . .	6
VI.	<u>PAYMENT OF RESPONSE COSTS</u> . . . . .	7
VII.	<u>FAILURE TO COMPLY WITH CONSENT DECREE.</u> . . . . .	10
VIII.	<u>COVENANT NOT TO SUE BY PLAINTIFF[S]</u> . . . . .	12
IX.	<u>RESERVATION OF RIGHTS BY UNITED STATES</u> . . . . .	13
X.	<u>COVENANT NOT TO SUE BY SETTLING DEFENDANTS</u> . . . . .	14
XI.	<u>EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION</u> . . . . .	15
—.	<u>[ACCESS (AND INSTITUTIONAL CONTROLS)]</u> . . . . .	16
—.	<u>[ACCESS TO INFORMATION]</u> . . . . .	18
XII.	<u>RETENTION OF RECORDS</u> . . . . .	19
XIII.	<u>NOTICES AND SUBMISSIONS</u> . . . . .	20
XIV.	<u>RETENTION OF JURISDICTION.</u> . . . . .	21
XV.	<u>INTEGRATION[/APPENDICES]</u> . . . . .	21
XVI.	<u>LODGING AND OPPORTUNITY FOR PUBLIC COMMENT</u> . . . . .	21
XVII.	<u>SIGNATORIES/SERVICE</u> . . . . .	21
XVIII.	<u>FINAL JUDGMENT</u> . . . . .	22

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF [\_\_\_\_\_]
   
[\_\_\_\_\_] DIVISION<sup>1</sup>

	)	
UNITED STATES OF AMERICA,	)	
	)	
[and	)	
	)	
THE STATE OF _____]	)	
	)	
Plaintiff[s],	)	
	)	Civil Action No. _____
v.	)	
	)	Judge _____
[DEFENDANTS]	)	
	)	
Defendants.	)	
	)	

**CONSENT DECREE**

**I. BACKGROUND**

A. The United States of America (“United States”), on behalf of the Administrator of the United States Environmental Protection Agency (“EPA”), filed a complaint in this matter pursuant to Section[(s) 106 and] 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § [§ 9606 and] 9607, as amended (“CERCLA”), seeking [injunctive relief and] reimbursement of response costs incurred or to be incurred for response actions taken or to be taken at or in connection with the release or threatened release of hazardous substances at the [insert Site name] in [insert City, County, State] (“the Site”).

[\_\_\_. The State of \_\_\_\_\_ (the “State”) also filed a complaint against the defendants [if Settling Federal Agencies, insert, “and the United States”] in this Court alleging that the defendants [if Settling Federal Agencies, insert, “and Settling Federal Agencies”] are liable to the State under Section 107 of CERCLA, 42 U.S.C. § 9607, and [list State laws cited in State’s complaint]. The State in its complaint seeks [insert relief sought].]

---

<sup>1</sup> Follow local rules for caption format.

B. The defendants that have entered into this Consent Decree (“Settling Defendants”) do not admit any liability to Plaintiff[s] arising out of the transactions or occurrences alleged in the complaint[s].<sup>2</sup> [If Settling Federal Agencies, insert, “Settling Federal Agencies do not admit any liability arising out of the transactions or occurrences alleged in any counterclaim asserted by Settling Defendants (or any claim by the State).”]

C. The United States and Settling Defendants agree, and this Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that settlement of this matter will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

THEREFORE, with the consent of the Parties to this Decree, it is ORDERED, ADJUDGED, AND DECREED:

## **II. JURISDICTION**

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. §§ [9606,] 9607 and 9613(b) and also has personal jurisdiction over Settling Defendants. Settling Defendants consent to and shall not challenge entry of this Consent Decree or this Court’s jurisdiction to enter and enforce this Consent Decree.

## **III. PARTIES BOUND**

2. This Consent Decree is binding upon the United States [and the State], and upon Settling Defendants and their heirs, successors and assigns. Any change in ownership or corporate or other legal status, including, but not limited to, any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of Settling Defendants under this Consent Decree.

## **IV. DEFINITIONS**

3. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in any appendix attached hereto, the following definitions shall apply:

a. “CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*

b. “Consent Decree” shall mean this Consent Decree and all appendices attached

---

<sup>2</sup> In situations where the court has entered summary judgment as to liability, we normally should preserve that result in a subsequent settlement by deleting this Paragraph B and replacing it with one that describes the summary judgment decision.

hereto. In the event of conflict between this Consent Decree and any appendix, this Consent Decree shall control.

c. “Day” shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

d. “DOJ” shall mean the United States Department of Justice and any successor departments, agencies or instrumentalities of the United States.

e. “EPA” shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.

f. “EPA Hazardous Substance Superfund” shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

g. “Interest” shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.<sup>3</sup>

**[Insert the following definition if any of the Settling Defendants are Site owners.]** [\_\_\_ “Owner Settling Defendants” shall mean [insert names of Settling Defendants who are Site owners].]

h. “Paragraph” shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper or lower case letter.

i. “Parties” shall mean the United States[, the State of \_\_\_\_\_,] [and] the Settling Defendants [, and the Settling Federal Agencies].

j. “Plaintiff[s]” shall mean the United States [and the State].

k. “RCRA” shall mean the Solid Waste Disposal Act, 42 U.S.C. § 6901, *et seq.* (also known as the Resource Conservation and Recovery Act).

l. “Section” shall mean a portion of this Consent Decree identified by a Roman

---

<sup>3</sup> The Superfund currently is invested in 52-week MK bills. The interest rate for these MK bills changes on October 1 of each year. To obtain the current rate, contact Vince Velez, Office of Administration and Resource Management, Financial Management Division, Program and Cost Accounting Branch, at (202) 564-4972.

numeral.

m. “Settling Defendants” shall mean [insert names of settling non-Federal Agency parties, or if numerous, “those parties identified in Appendix A.”]

**[If Settling Federal Agencies, insert the following definition.]** [\_\_\_. “Settling Federal Agencies” shall mean those departments, agencies, and instrumentalities of the United States identified in Appendix \_\_\_\_.”]

n. “Site” shall mean the \_\_\_\_\_ Superfund site, encompassing approximately \_\_\_\_ acres, located at [insert address or description of location] in [insert City, County, State], and [insert either “generally shown on the map included in Appendix \_\_\_\_” or “generally designated by the following property description: \_\_\_\_\_.”]

[\_\_\_. “State” shall mean the State (or Commonwealth) of \_\_\_\_\_.]

**[If the Decree includes a payment to the State, insert the following definition.]** [\_\_\_. “State Response Costs” shall mean [insert definition], but not including amounts reimbursed to the State by EPA.]

o. “United States” shall mean the United States of America, including its departments, agencies and instrumentalities.

## **V. STATEMENT OF PURPOSE**

**[EXPLANATORY NOTE ON SETTLEMENT OPTIONS UNDER THIS MODEL: In exchange for the covenant not to sue provided in Section VIII of this Decree, peripheral party cashout settlements should address the risk of cost overruns during performance of response action at the Site through one of three means:**

- 1) payment of an up-front premium;**
- 2) agreement to pay a percentage of actual future costs upon receipt of one or more future bills, if total response costs exceed EPA’s estimate, as shown in the Payment of Additional Response Costs provision in the Appendix to this model; or**
- 3) inclusion of the cost overrun reservation of rights shown in Subparagraph 16(f) below, which preserves the United States’ ability to seek additional response costs or performance of response action from Settling Defendants if total response costs at the Site exceed the estimate upon which Settling Defendants’ payment is based.]**

4. By entering into this Consent Decree, the mutual objective of the Parties is for Settling Defendants [if Settling Federal Agencies, insert, “and Settling Federal Agencies”] to make a cash

payment[, which includes a premium,] to address their liability for the Site as provided in the Covenant Not to Sue by Plaintiff[s] in Section VIII [if Settling Federal Agencies delete “Not to Sue”], and subject to the Reservations of Rights by United States in Section IX.

## **VI. PAYMENT OF RESPONSE COSTS**

5. Within 30 days of entry of this Consent Decree, Settling Defendants shall pay to the EPA \$\_\_\_\_\_, plus an additional sum for Interest on that amount calculated from [insert date, *e.g.*, date of last cost summary] through the date of payment.

6. **[NOTE: The following language should be used if the payment amount is above \$10,000.]** Payment [if Settling Federal Agencies, insert, “by Settling Defendants”] shall be made by FedWire Electronic Funds Transfer (“EFT”) to the U.S. Department of Justice account in accordance with current EFT procedures, referencing USAO File Number \_\_\_\_\_, the EPA Region and Site Spill ID Number \_\_\_\_\_, and DOJ Case Number \_\_\_\_\_. Payment shall be made in accordance with instructions provided to Settling Defendants by the Financial Litigation Unit of the U.S. Attorney’s Office in the District of \_\_\_\_\_ following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. Eastern Time shall be credited on the next business day.

**[NOTE: The following alternative language may be used if the payment amount is below \$10,000.]** Payment [if Settling Federal Agencies, insert, “by Settling Defendants”] shall be made by certified check or checks or cashier’s check or checks made payable to “U.S. Department of Justice,” referencing the name and address of the party making payment, the EPA Region and Site Spill ID Number \_\_\_\_\_, and DOJ Case Number \_\_\_\_\_. Settling Defendants shall send the check[s] to:

[Insert address of Financial Litigation Unit of U.S. Attorney’s Office for the District in which the Consent Decree will be entered]

7. At the time of payment, Settling Defendants shall send notice that payment has been made to EPA and DOJ in accordance with Section XIII (Notices and Submissions) and to [insert names and mailing addresses of the Regional Financial Management Officer and any other receiving officials at EPA].

8. The total amount to be paid pursuant to Paragraph 5 [if Settling Federal Agencies, insert, “by Settling Defendants”] shall be deposited in the [Site name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

**[NOTE ON SPECIAL ACCOUNTS: Payments made under Paragraph 5 may be deposited in the EPA Hazardous Substance Superfund or in a site-specific special account within the**

**Hazardous Substance Superfund (more accurately referred to as a “reimbursable account”). The Decree should include clear instructions indicating which portion of the payment is to be placed in the Hazardous Substance Superfund and which portion of the payment is to be retained in a special account. Under Paragraph 8 as written, 100% of the payment will be deposited in a special account. The following language may be substituted if all or part of the payment will be deposited in the EPA Hazardous Substance Superfund.]<sup>4</sup>**

**[If the entire payment will be deposited in the EPA Hazardous Substance Superfund:]**

“The total amount to be paid [if Settling Federal Agencies, insert, “by Settling Defendants”] pursuant to Paragraph 5 shall be deposited in the EPA Hazardous Substance Superfund.”

**[If the payment will be split between the EPA Hazardous Substance Superfund and a special account:]**

“Of the total amount to be paid [if Settling Federal Agencies, insert, “by Settling Defendants”] pursuant to Paragraph 5 of this Consent Decree, [‘\$\_\_\_\_’ or ‘\_\_\_\_%’] shall be deposited in the EPA Hazardous Substance Superfund and [‘\$\_\_\_\_’ or ‘\_\_\_\_%’] shall be deposited in the [Site name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.”

**[If payment is to be made to a State, insert the following paragraph.]** [\_\_\_\_. Payment of State Response Costs. Within 30 days of entry of this Consent Decree, Settling Defendants shall pay to the State \$\_\_\_\_ in reimbursement of State Response Costs, in the form of a certified check or checks or cashier’s check or checks. The check[s] shall be made payable to \_\_\_\_ and shall reference [insert name of case]. Settling Defendants shall send the check[s] to:

[Insert address provided by State]]

**[If Settling Federal Agencies are making payments, insert the following paragraph.]**

[8.1. As soon as reasonably practicable after the date of entry of this Consent Decree[, and consistent with Paragraph 8.1(a)(iii),] the United States, on behalf of the Settling Federal Agencies, shall:

[a](i). Pay to the EPA \$ \_\_\_\_.

---

<sup>4</sup> When PRPs are performing the response action at the Site, payments to be made by Settling Defendants (and Settling Federal Agencies, if any) for future response costs and premiums may, when appropriate, be directed to PRP-managed trust funds or escrow accounts established pursuant to settlements with EPA rather than to an EPA special account.



[a](ii). The total amount to be paid by Settling Federal Agencies pursuant to Paragraph 8.1 shall be deposited in the [Site name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund. **[Insert one of the following alternative instructions if part or all of the Settling Federal Agencies' payment will be deposited in the EPA Hazardous Substance Superfund:]**<sup>5</sup>

“The total amount to be paid by Settling Federal Agencies pursuant to Paragraph 8.1 shall be deposited in the EPA Hazardous Substance Superfund.”

“Of the total amount to be paid by Settling Federal Agencies pursuant to Paragraph 8.1 of this Consent Decree, ['\$\_\_\_\_\_' or '\_\_\_\_%'] shall be deposited in the EPA Hazardous Substance Superfund and ['\$\_\_\_\_\_' or '\_\_\_\_%'] shall be deposited in the [Site name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.”

[a](iii). If the payment to the EPA required by this Paragraph 8.1[a][i] is not made as soon as reasonably practicable, the appropriate EPA Regional Branch Chief may raise any issues relating to payment to the appropriate DOJ Assistant Section Chief for the Environmental Defense Section. In any event, if this payment is not made within 120 days after the date of entry of this Consent Decree, EPA and DOJ have agreed to resolve the issue within 30 days in accordance with a letter agreement dated December 28, 1998.

[b.] Pay to the State \$ \_\_\_\_\_ in reimbursement of State Response Costs in the form of a check or checks made payable to \_\_\_\_\_ and sent to \_\_\_\_\_, or by Electronic Funds Transfer in accordance with instructions provided by the State.

[c.] Pay to the Settling Defendants \$ \_\_\_\_\_ in reimbursement of Settling Defendants' past and future response costs at the Site, in the form of a check or checks made payable to \_\_\_\_\_ and sent to \_\_\_\_\_, or by Electronic Funds Transfer in accordance with instructions provided by Settling Defendants.

8.2. In the event that payments required by Paragraph 8.1 are not made within (X) (X = private PRP payment period) days of the date of entry of this Consent Decree, Interest on the unpaid balance shall be paid at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), commencing on the date of entry of this Consent Decree and accruing through the date of the payment.

---

<sup>5</sup> See n. 4 *supra*.

8.3. The Parties to this Consent Decree recognize and acknowledge that the payment obligations of Settling Federal Agencies under this Consent Decree can only be paid from appropriated funds legally available for such purpose. Nothing in this Consent Decree shall be interpreted or construed as a commitment or requirement that any Settling Federal Agency obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.]

**[NOTE: If Settling Defendants (or Settling Federal Agencies) have agreed to pay a percentage of actual future costs upon receipt of one or more future bills (option 2 of the Explanatory Note in Section V), insert the Additional Response Costs language provided in the Appendix to this model.]**

## **VII. FAILURE TO COMPLY WITH CONSENT DECREE**

9. Interest on Late Payments. If any Settling Defendant fails to make any payment under Paragraph 5 [also reference State payment and Additional Response Costs payment, if applicable] by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment.

### 10. Stipulated Penalty.

a. If any amounts due under Paragraph 5 [also reference State payment and Additional Response Costs payment, if applicable] are not paid by the required due date, Settling Defendants shall be in violation of this Consent Decree and shall pay, as a stipulated penalty, in addition to the interest required by Paragraph 9, \$\_\_\_\_ per violation per day that such payment is late.

**[NOTE: If the Decree includes any non-payment obligations for which a stipulated penalty is due, insert, “If Settling Defendants do not comply with [reference sections containing non-payment obligations], Settling Defendants shall be in violation of this Consent Decree and shall pay to EPA, as a stipulated penalty, \$\_\_\_\_ per violation per day of such noncompliance.” Escalating penalty payment schedules may be used for payment or non-payment obligations.]**

b. Stipulated penalties are due and payable within 30 days of the date of the demand for payment of the penalties by EPA [or the State]. All payments to EPA under this Paragraph shall be identified as “stipulated penalties” and shall be made by certified or cashier’s check made payable to “EPA Hazardous Substance Superfund.” The check, or a letter accompanying the check, shall reference the name and address of the party(ies) making payment, the Site name, the EPA Region and Site Spill ID Number \_\_\_\_\_, and DOJ Case Number \_\_\_\_\_, and shall be sent to:

EPA Superfund  
[Insert Regional lockbox number and address]

c. At the time of each payment, Settling Defendants shall send notice that payment has been made to EPA and DOJ in accordance with Section XIII (Notices and Submissions) and to [insert names and mailing addresses of the Regional Financial Management Officer and any other receiving officials at EPA].

**[NOTE: If applicable, insert State payment instructions for stipulated penalties for failure to pay State Response Costs.]**

d. Penalties shall accrue as provided in this Paragraph regardless of whether EPA [or the State] has notified Settling Defendants of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment [if non-payment obligations, insert, “or performance”] is due [if non-payment obligations are included, insert, “or the day a violation occurs,”] and shall continue to accrue through the date of payment [if non-payment obligations are included, insert, “or the final day of correction of the noncompliance or completion of the activity.”] Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

11. If the United States [or the State] brings an action to enforce this Consent Decree, Settling Defendants shall reimburse the United States [and the State] for all costs of such action, including but not limited to costs of attorney time.

12. Payments made under this Section shall be in addition to any other remedies or sanctions available to Plaintiff[s] by virtue of Settling Defendants’ failure to comply with the requirements of this Consent Decree.

13. The obligations of Settling Defendants to pay amounts owed the United States [and the State] under this Consent Decree are joint and several. In the event of the failure of any one or more Settling Defendants to make the payments required under this Consent Decree, the remaining Settling Defendants shall be responsible for such payments.<sup>6</sup>

14. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Consent Decree. Payment of stipulated penalties shall not excuse Settling Defendants from payment as required by Section VI or from performance of any other requirements of this Consent Decree.

---

<sup>6</sup> If multiple, wholly unrelated parties are settling with the United States in one peripheral party consent decree, then it may be appropriate to make the obligation to pay, and the consequences of non-payment (*i.e.*, interest and stipulated penalties), individual rather than joint and several.

### **VIII. COVENANT NOT TO SUE BY PLAINTIFF[S]**

**[If Settling Federal Agencies are making payments, delete “not to sue” from title of this Section.]**

15. Covenant Not to Sue [if Settling Federal Agencies are making payments, insert, “Settling Defendants”] by United States. Except as specifically provided in Section IX (Reservation of Rights by United States), the United States covenants not to sue or to take administrative action against Settling Defendants pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), [and Section 7003 of RCRA, 42 U.S.C. § 6973,]<sup>7</sup> with regard to the Site.<sup>8</sup> With respect to present and future liability, this covenant not to sue shall take effect upon receipt by EPA of all payments required by Section VI (Payment of Response Costs) [if Payment of Additional Response Cost provision is used, reference only those paragraphs within Section VI that do not include Additional Response Costs] and any amount due under Section VII (Failure to Comply with Consent Decree). This covenant not to sue is conditioned upon the satisfactory performance by Settling Defendants of their obligations under this Consent Decree. This covenant not to sue extends only to Settling Defendants and does not extend to any other person.

**[NOTE: If Settling Federal Agencies are making payments and qualify for peripheral party status at the Site, insert the following covenant. If they do not qualify for peripheral party status, the scope of the covenant will require case-specific discussion.]**

[15.1. Covenant for Settling Federal Agencies by EPA. Except as specifically provided in Paragraph 16 (Reservation of Rights by United States), EPA covenants not to take administrative action against Settling Federal Agencies<sup>9</sup> pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), [and Section 7003 of RCRA, 42 U.S.C. § 6973,] with regard to the Site.<sup>10</sup> With respect to present and future liability, this covenant shall take effect upon receipt by EPA of all payments required by Section VI (Payment of Response Costs) [if Payment of Additional Response Cost Provision is used, reference only those paragraphs within Section VI that do not include Additional Response Costs]. This covenant is conditioned upon the satisfactory performance by Settling Federal Agencies of their obligations under this Consent

---

<sup>7</sup> Note that when a 7003 covenant is included, Section 7003(d) of RCRA requires that an opportunity for a public meeting in the affected area be provided.

<sup>8</sup> This covenant assumes that the United States has decided to grant a full covenant not to sue for the Site as a whole. If a covenant of lesser scope is intended, this will need to be narrowed.

<sup>9</sup> Note that in some instances EPA’s covenant may also be extended to a Federal PRP contractor where the Federal PRP settlement includes the contractor. This generally occurs where the contractor is indemnified by the United States under the contract.

<sup>10</sup> See n. 7 and 8 *supra*.

Decree. This covenant extends only to Settling Federal Agencies and does not extend to any other person.]

## **IX. RESERVATION OF RIGHTS BY UNITED STATES**

16. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendants with respect to all matters not expressly included within the Covenant Not to Sue [if Settling Federal Agencies, delete “Not to Sue”] by United States in Paragraph 15 [if Settling Federal Agencies, insert, “and the Covenant by EPA in Paragraph 15.1.”] Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against Settling Defendants [if Settling Federal Agencies, insert, “and EPA and the federal natural resource trustees [and the State] reserve, and this Consent Decree is without prejudice to, all rights against Settling Federal Agencies,”] with respect to:

a. liability for failure of Settling Defendants [or Settling Federal Agencies] to meet a requirement of this Consent Decree;

b. criminal liability;

c. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

**[NOTE: The precise terms of Subparagraph 16(d) may need to be changed for any Settlor who has a continuing relationship with the Site.]** d. liability, based upon Settling Defendants’ [or Settling Federal Agencies’] ownership or operation of the Site, or upon Settling Defendants’ [or Settling Federal Agencies’] transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal, of a hazardous substance or a solid waste at or in connection with the Site, after signature of this Consent Decree by Settling Defendants [or Settling Federal Agencies];

e. liability arising from the past, present, or future disposal, release or threat of release of a hazardous substance, pollutant, or contaminant outside of the Site; [and]

**[NOTE: Insert Subparagraph 16(f) if Settling Defendants (or Settling Federal Agencies) have not agreed in Section VI (Payment of Response Costs) to compensate EPA for the costs described in Subparagraph 16(f) through a premium payment or an Additional Response Costs billing provision.]** [f. liability for performance of response action or for reimbursement of response costs if total response costs incurred or to be incurred at or in connection with the Site by the United States or any other person exceed \$\_\_\_\_ [insert total response cost estimate upon which Settling Defendants’ payment is based.]

**[NOTE: If the State is a co-plaintiff, insert separate paragraphs for the State’s covenant not to sue Settling Defendants (and Settling Federal Agencies, if any) and reservation of rights.]**

## **X. COVENANT NOT TO SUE BY SETTLING DEFENDANTS**

17. Settling Defendants covenant not to sue and agree not to assert any claims or causes of action against the United States [or the State], or its [their] contractors or employees, with respect to the Site<sup>11</sup> or this Consent Decree, including but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the [State] Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Site.<sup>12</sup>

Except as provided in Paragraph 19 (Waiver of Claims) and Paragraph 23 (Waiver of Claim-Splitting Defenses), these covenants not to sue shall not apply in the event the United States [or the State] brings a cause of action or issues an order pursuant to the reservations set forth in Paragraph 16 (c) - (f), but only to the extent that Settling Defendants' claims arise from the same response action or response costs that the United States [or the State] is seeking pursuant to the applicable reservation.

18. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

19. Settling Defendants agree not to assert any CERCLA claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any other person. [This waiver shall not apply with respect to any defense, claim, or cause of action that a

---

<sup>11</sup> If the Decree does not cover the Site as a whole, the reference to "the Site" here and in Subparagraph 17(b) should be narrowed to conform to the intended scope of the Consent Decree.

<sup>12</sup> The settlement should, wherever possible, release or resolve any claims by Settling Defendants against the United States related to the Site. Where a claim is asserted by a potentially responsible party, or the Region has any information suggesting federal agency liability, all information relating to potential federal liability should be provided to the affected agency and DOJ as soon as possible in order to resolve any such issues in the settlement. Only in exceptional circumstances where federal liability cannot be resolved in a timely manner in the settlement should this provision be deleted and private parties be allowed to reserve their rights.

Settling Defendant may have against any person if such person asserts a claim or cause of action relating to the Site against such Settling Defendant.]

## **XI. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION**

20. Except as provided in Paragraph 19, nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this Decree may have under applicable law. Except as provided in Paragraph 19, the Parties expressly reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which they may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

21. The Parties agree, and by entering this Consent Decree this Court finds, that Settling Defendants [and Settling Federal Agencies] are entitled, as of the date of entry of this Consent Decree, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for “matters addressed” in this Consent Decree. The “matters addressed” in this Consent Decree are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States or any other person. The “matters addressed” in this Consent Decree do not include those response costs or response actions as to which the United States has reserved its rights under this Consent Decree (except for claims for failure to comply with this Decree), in the event that the United States asserts rights against Settling Defendants coming within the scope of such reservations.<sup>13</sup>

22. Each Settling Defendant agrees that, with respect to any suit or claim for contribution brought by it for matters related to this Consent Decree, it will notify EPA and DOJ [and the State] in writing no later than 60 days prior to the initiation of such suit or claim. Each Settling Defendant also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Consent Decree, it will notify EPA and DOJ [and the State] in writing within 10 days of service of the complaint or claim upon it. In addition, each Settling Defendant shall notify EPA and DOJ [and the State] within 10 days of service or receipt of any Motion for Summary Judgment, and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Consent Decree.

23. In any subsequent administrative or judicial proceeding initiated by the United States [or the State] for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the

---

<sup>13</sup> This definition of “matters addressed” assumes that this Decree is designed to resolve fully Settling Defendants’ [and Settling Federal Agencies’] liability at the Site pursuant to Sections 106 and 107(a) of CERCLA, subject only to the reservations of rights. If the intended resolution of liability is narrower in scope, then the definition of “matters addressed” will need to be narrowed.

principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States [or the State] in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenant Not to Sue by Plaintiff[s] [if Settling Federal Agencies, delete “not to sue”] set forth in Section VIII.

**[\_\_ . ACCESS (AND INSTITUTIONAL CONTROLS)]**

**[NOTE: This Section should be used only if a Settling Defendant is a Site owner or otherwise controls access to the Site or to other property to which access is needed. Subparagraph (a) of the first paragraph should be used to secure access. Subparagraph (b) of the first paragraph should be included if EPA determines that land/water use restrictions are needed on property owned by the settling landowner to ensure the integrity or protectiveness of the remedial action. Subparagraph (c) of the first paragraph should be included if EPA determines that a property interest running with the land (granting either a right of access or a right to enforce land/water use restrictions) should be acquired by EPA or another grantee from a settling landowner.]**

[\_\_ . If the Site, or any other property where access and/or land/water use restrictions are needed to implement response activities at the Site, is owned or controlled by any of the Owner Settling Defendants, such Owner Settling Defendants shall:

a. commencing on the date of lodging of this Consent Decree, provide the United States[, the State,] and its [their] representatives, including EPA and its contractors, with access at all reasonable times to the Site, or such other property, for the purpose of conducting any response activity related to the Site, including, but not limited to, the following activities:

1. Monitoring, investigation, removal, remedial or other activities at the Site;
2. Verifying any data or information submitted to the United States [or the State];
3. Conducting investigations relating to contamination at or near the Site;
4. Obtaining samples;
5. Assessing the need for, planning, or implementing additional response actions at or near the Site;
6. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Defendants or their agents, consistent with Section \_\_ (Access to Information);



7. Assessing Settling Defendants' compliance with this Consent Decree;  
and

8. Determining whether the Site or other property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted, by or pursuant to this Consent Decree;

b. commencing on the date of lodging of this Consent Decree, refrain from using the Site, or such other property, in any manner that would interfere with or adversely affect the implementation, integrity or protectiveness of the [removal or] remedial measures to be performed at the Site; and

c. execute and record in the Recorder's Office [or Registry of Deeds or other appropriate land records office] of \_\_\_\_\_ County, State of \_\_\_\_\_, an easement, running with the land, that (i) grants a right of access for the purpose of conducting response activities at the Site, and (ii) grants the right to enforce the land/water use restrictions listed in Paragraph \_\_ (b) [cross-reference immediately preceding paragraph] of this Consent Decree, or other restrictions that EPA determines are necessary to implement, ensure non-interference with, or ensure the protectiveness of the [removal or] remedial measures to be performed at the Site. Owner Settling Defendants shall grant the access rights and the rights to enforce the land/water use restrictions to [(i) the United States, on behalf of EPA, and its representatives, (ii) the State and its representatives, (iii) and/or other appropriate grantees].<sup>14</sup> Owner Settling Defendants shall, within 45 days of entry of this Consent Decree,<sup>15</sup> submit to EPA for review and approval with respect to such property:

1. a draft easement, in substantially the form attached hereto as Appendix \_\_, that is enforceable under the laws of the State of \_\_\_\_\_, free and clear of all prior liens and encumbrances (except as approved by EPA), and acceptable under the Attorney General's Title Regulations promulgated pursuant to 40 U.S.C. § 255; and

2. current title commitment or report prepared in accordance with the U.S. Department of Justice Standards for the Preparation of Title Evidence in Land Acquisitions by the United States (1970) (the "Standards").

---

<sup>14</sup> If, at the time that a Consent Decree is being negotiated, EPA is not able to determine which persons should be the grantees of the easement, this Subparagraph c should be redrafted to insert the phrase "one or more of the following persons, as determined by EPA," prior to the bracketed list of potential grantees.

<sup>15</sup> If, at the time that a Consent Decree is being negotiated, EPA is unable to determine whether it wants to obtain an easement that runs with the land, but believes that it might want to obtain such an interest in the future, this Subparagraph c should be redrafted to insert the phrase "if EPA so requests," at the beginning of the subparagraph, and Settling Defendants should be required to submit the draft easement a certain number of days from the date of EPA's request.

Within 15 days of EPA's approval and acceptance of the easement, Owner Settling Defendants shall update the title search and, if it is determined that nothing has occurred since the effective date of the commitment or report to affect the title adversely, record the easement with the Recorder's Office [or Registry of Deeds or other appropriate office] of \_\_\_\_ County. Within 30 days of recording the easement, Owner Settling Defendants shall provide EPA with final title evidence acceptable under the Standards, and a certified copy of the original recorded easement showing the clerk's recording stamps.

\_\_\_\_. If EPA determines that land/water use restrictions in the form of state or local laws, regulations, ordinances or other governmental controls are needed to implement response activities at the Site, ensure the integrity and protectiveness thereof, or ensure non-interference therewith, Owner Settling Defendants shall cooperate with EPA's [and the State's] efforts to secure such governmental controls.

\_\_\_\_. Notwithstanding any provision of this Consent Decree, the United States [and the State] retain[s] all of its access authorities and rights, as well as all of its [their] rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statute or regulations.]

#### **[. ACCESS TO INFORMATION<sup>16</sup> ]**

[\_\_\_\_. Settling Defendants shall provide to EPA [and the State], upon request, copies of all records, reports, or information (hereinafter referred to as "records") within their possession or control or that of their contractors or agents relating to activities at the Site [if needed, include "or to the implementation of this Consent Decree"], including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Site.

#### **\_\_\_\_. Confidential Business Information and Privileged Documents.**

a. Settling Defendants may assert business confidentiality claims covering part or all of the records submitted to Plaintiff[s] under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. 2.203(b). Records determined to be confidential by EPA will be accorded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies records when they are submitted to EPA [and the State], or if EPA has notified Settling Defendants that the records are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such records without further notice to Settling Defendants.

---

<sup>16</sup> Include this Section only if Settling Defendants have been or will be involved in cleanup efforts at the Site or if they may possess information which may assist the Agency in its cleanup or enforcement efforts.

b. Settling Defendants may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendants assert such a privilege in lieu of providing records, they shall provide Plaintiff[s] with the following: 1) the title of the record; 2) the date of the record; 3) the name and title of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. However, no records created or generated pursuant to the requirements of this or any other settlement with the United States shall be withheld on the grounds that they are privileged.

\_\_\_\_. No claim of confidentiality shall be made with respect to any data, including but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other records evidencing conditions at or around the Site.]

## **XII. RETENTION OF RECORDS**

**[NOTE: Paragraphs 24 and 25 may be deleted in peripheral party settlements if the Region believes that all relevant records have already been provided to EPA. If they are deleted, change the title of this Section to Certification and make a conforming change to the title in the Table of Contents.]**

24. Until [10] years after the entry of this Consent Decree, each Settling Defendant shall preserve and retain all records now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at the Site or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary.

25. After the conclusion of the document retention period in the preceding paragraph, Settling Defendants shall notify EPA and DOJ [and the State] at least 90 days prior to the destruction of any such records, and, upon request by EPA or DOJ [or the State], Settling Defendants shall deliver any such records to EPA [or the State]. Settling Defendants may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendants assert such a privilege, they shall provide Plaintiff[s] with the following: 1) the title of the record; 2) the date of the record; 3) the name and title of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. However, no records created or generated pursuant to the requirements of this or any other settlement with the United States shall be withheld on the grounds that they are privileged.

26. Each Settling Defendant hereby certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or information relating to its potential liability regarding the Site since notification of potential liability by the United States or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information

pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

[If Settling Federal Agencies, insert, “\_\_\_. The United States acknowledges that each Settling Federal Agency (1) is subject to all applicable Federal record retention laws, regulations, and policies; and (2) has fully complied with any and all EPA [and State] requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.”<sup>17</sup>]

### **XIII. NOTICES AND SUBMISSIONS**

27. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, DOJ, [the Settling Federal Agencies,] [the State,] and Settling Defendants, respectively.

As to the United States:

As to DOJ:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice (DJ # \_\_\_\_\_)  
P.O. Box 7611  
Washington, D.C. 20044-7611

As to EPA:

[Insert names and addresses of Regional Attorney or Remedial Project Manager and contact in Regional Comptroller’s Office]

[As to the State:

Insert name and address of State contact if the State is a party to the Consent Decree]

As to Settling Defendants:

---

<sup>17</sup> EPA attorneys must assure that the Agency has received a written response to any Information Requests that it has sent to Settling Federal Agencies containing a certification substantially similar to that required from private PRPs. *See* Paragraph 26.

[Insert name of one person who will serve as the contact for all Settling Defendants]

**XIV. RETENTION OF JURISDICTION**

28. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

**XV. INTEGRATION[/APPENDICES]**

29. This Consent Decree and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree. [The following appendices are attached to and incorporated into this Consent Decree: “Appendix A” is the complete list of Settling Defendants; [and] “Appendix B” is the map of the Site; and “Appendix \_\_\_” is the complete list of Settling Federal Agencies].]

**XVI. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

30. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice.

31. If for any reason this Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

**XVII. SIGNATORIES/SERVICE**

32. Each undersigned representative of a Settling Defendant to this Consent Decree and the [Assistant Attorney General for the Environment and Natural Resources Division]<sup>18</sup> of the United States Department of Justice [insert State official] certifies that he or she is authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such Party to this document.

---

<sup>18</sup> Substitute Chief/Deputy Chief, Environmental Enforcement Section, where the case involves a site where site costs do not exceed \$20 million and the size of the compromise does not exceed \$1 million, or where the settlement is with an individual defendant and the settlement does not exceed \$1 million.

33. Each Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified Settling Defendants in writing that it no longer supports entry of the Consent Decree.

34. Each Settling Defendant shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of that Party with respect to all matters arising under or relating to this Consent Decree. Settling Defendants hereby agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to, service of a summons. [The Parties agree that Settling Defendants need not file an answer to the complaint in this action unless or until the Court expressly declines to enter this Consent Decree.]

### **XVIII. FINAL JUDGMENT**

35. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute the final judgment between and among the United States and the Settling Defendants. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS \_\_\_\_ DAY OF \_\_\_\_\_, 2\_\_\_\_.

\_\_\_\_\_  
United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of [insert case name and civil action number], relating to the \_\_\_\_\_ Superfund Site.

FOR THE UNITED STATES OF AMERICA

---

[Name]  
United States Attorney  
[Address]

---

[Name]  
Attorney  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, DC 20044-7611

Date: \_\_\_\_\_

---

[Name]  
Environmental Defense Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 23986  
Washington, D.C. 20026-3986

---

[Name]<sup>19</sup>  
Assistant Administrator for Enforcement and  
Compliance Assurance  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

---

[Name]  
Regional Administrator, Region [ ]  
U.S. Environmental Protection Agency  
[Address]

---

[Name]  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
[Address]

---

<sup>19</sup> Include AA-OECA signature block only if he or she has a concurrence role under current Headquarters review procedures.



[THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of [insert case name and civil action number], relating to the \_\_\_\_\_ Superfund Site.

FOR THE STATE OF [ \_\_\_\_\_ ]

Date: \_\_\_\_\_

\_\_\_\_\_  
[Names and addresses of State signatories]

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of [insert case name and civil action number], relating to the \_\_\_\_\_ Superfund Site.

FOR DEFENDANT [ \_\_\_\_\_ ]

Date: \_\_\_\_\_  
[Names and addresses of Defendant's signatories]

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Address: \_\_\_\_\_

## APPENDIX

### OPTIONAL PAYMENT OF ADDITIONAL RESPONSE COSTS PROVISION

**Insert the following definition in Section IV:**

[\_\_\_. “Additional Response Costs” are all costs, including but not limited to direct and indirect costs, that EPA or the U.S. Department of Justice on behalf of EPA incurs and pays at or in connection with the Site, to the extent such costs exceed \$ \_\_\_\_ [insert total response cost estimate upon which Settling Defendants’ payment is based .]”]

**Insert the following two paragraphs at the end of Section VI:**

[8.4. Payment of Additional Response Costs.

a. Settling Defendants [and Settling Federal Agencies] shall pay the EPA Hazardous Substance Superfund for [\_\_% of] Additional Response Costs not inconsistent with the National Contingency Plan. If Additional Response Costs are incurred, EPA will send Settling Defendants [and Settling Federal Agencies] one or more bills requiring payment [of that percentage], which includes a [name standard Regionally-prepared cost summary, which includes direct and indirect costs incurred by EPA and its contractors; also insert name of DOJ-prepared cost summary which would reflect any costs incurred by DOJ and its contractors]. Settling Defendants shall make all payments within 30 days of receipt of each bill requiring payment, except as otherwise provided in Paragraph 8.5 (Resolution of Disputes Concerning Payment of Additional Response Costs). Payment [if Settling Federal Agencies, insert, “by Settling Defendants”] shall be made by certified check or checks or cashier’s check or checks made payable to "EPA Hazardous Substance Superfund," referencing the name and address of the party making payment, the EPA Region and Site Spill ID Number \_\_\_\_\_, and DOJ Case Number \_\_\_\_\_. Settling Defendants shall send the check[s] to:

EPA-Superfund

[Insert appropriate Regional Superfund lockbox number and address]

b. At the time of payment, Settling Defendants shall send notice that payment has been made to EPA and DOJ in accordance with Section XIII (Notices and Submissions) and to [insert names and mailing addresses of the Regional Financial Management Officer and any other receiving officials at EPA].

c. The total amount to be paid by Settling Defendants pursuant to Paragraph 8.4(a) (Payment of Additional Response Costs) shall be deposited in the [Site name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA

Hazardous Substance Superfund. **[If part or all of the payment will be deposited in the EPA Hazardous Substance Superfund, rather than in a special account, insert appropriate language from the Note following Paragraph 8.0 of the model.]**<sup>20</sup>

**[If Settling Federal Agencies, insert the following Subparagraph.]** [d.] [The United States, on behalf of Settling Federal Agencies, shall make all Additional Response Cost payments as soon as reasonably practicable after receipt of each bill requiring payment, in the manner provided and consistent with Paragraph 8.1(a) above and subject to the limitations in Paragraph 8.3 above. In the event that an Additional Response Costs payment is not made by Settling Federal Agencies within 30 days of receipt of any bill, Interest on the unpaid balance shall be paid at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), commencing on the date of the bill and accruing through the date of the payment.]

8.5. Resolution of Disputes with Settling Defendants Concerning Payment of Additional Response Costs.

**[NOTE: Consider whether any ADR options should be included here.]**

a. Use of Dispute Resolution. The dispute resolution procedures set forth in this Paragraph shall be the exclusive mechanism for resolving disputes regarding Settling Defendants' obligation to reimburse EPA for Additional Response Costs. The dispute resolution procedures in this Paragraph are limited to disputes regarding recovery of Additional Response Costs. Nothing in this Paragraph shall be deemed to create a right to pre-enforcement review of response actions taken by EPA. However, Settling Defendants and, if required by Sections 113(k) or 117 of CERCLA, 42 U.S.C. § 9613(k) or 9617, the public, shall be provided with an opportunity to comment on any further response actions proposed by EPA as a result of any review conducted pursuant to Section 121(c) of CERCLA, 42 U.S.C. § 9621(c), and to submit written comments for the record during the comment period.

b. Standard. Settling Defendants may only contest payment of Additional Response Costs if they determine that EPA has made an accounting error or if they allege that a cost item that is included represents costs that are inconsistent with the National Contingency Plan.

c. Notice. Any objection to the payment of Additional Response Costs shall be made in writing by Settling Defendants within 30 days of receipt of the bill requiring the payment and must be sent to EPA pursuant to Section XIII (Notices and Submissions). Any such objection (hereinafter referred to as the "Notice of Objection") shall specifically identify the contested Additional Response Costs and the basis for objection.

---

<sup>20</sup> If PRPs are performing response action at the Site, it may be appropriate for some or all of these Additional Response Costs to be paid directly to a PRP trust fund or escrow account established pursuant to a settlement with EPA.

d. Payment of Undisputed Amounts. In the event of an objection to some but not all Additional Response Costs billed, Settling Defendants shall, within 30 days of receipt of the bill requiring payment, pay all uncontested amounts to EPA in accordance with the instructions in Paragraph 8.4.

e. Escrow for Disputed Amounts. Within 30 days of receipt of the bill requiring payment, Settling Defendants shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State of \_\_\_\_\_ and remit to that escrow account funds equivalent to the amount of the contested portion of the Additional Response Costs billed. Settling Defendants shall send to EPA a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account.

f. Informal Dispute Resolution. Any dispute with respect to Additional Response Costs shall in the first instance be the subject of informal negotiations between EPA and Settling Defendants. The period for informal negotiations shall not exceed 20 days from EPA's receipt of the Notice of Objection, unless such time limit is modified by written agreement of EPA and Settling Defendants. If the dispute is resolved by informal negotiations, the agreement shall be reduced to writing, which, upon signature by EPA and Settling Defendants, shall be incorporated into and become an enforceable part of this Consent Decree. Within 10 days of the execution of the agreement, Settling Defendants shall pay to EPA from the escrow account any amount owed to EPA pursuant to the agreement, plus Interest on such amount that has accrued between the date that payment was due under Paragraph 8.4 (Payment of Additional Response Costs) through the date of payment.

g. Formal Dispute Resolution.

i. Initiation. If the dispute is not resolved by informal dispute resolution, the position advanced by EPA shall be considered binding unless Settling Defendants, within 10 days after the conclusion of the informal dispute resolution period, commence formal dispute resolution by serving on the United States a Notice of Formal Dispute Resolution along with a written Statement of Position on the matter in dispute, which shall include, but not be limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by Settling Defendants.

ii. Within \_\_ days after receipt of Settling Defendants' Statement of Position, EPA shall serve on Settling Defendants its Statement of Position, including but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. Within \_\_ days after receipt of EPA's Statement of Position, Settling Defendants may submit a Reply.

iii. Administrative Record. Formal dispute resolution for disputes pertaining to payment of Additional Response Costs shall be on the administrative record. EPA shall maintain

an administrative record of the dispute, which shall include the disputed bill and cost summary sent by EPA to Settling Defendants, the Notice of Objection served by Settling Defendants, the Notice of Formal Dispute Resolution, the Statements of Position, including supporting documentation, and Settling Defendants' Reply, if any, submitted pursuant to this Paragraph.

iv. Final Decision. The [insert correct title for particular Region][Director of the Waste Management Division], EPA Region \_\_, will issue a final administrative decision resolving the dispute based upon the administrative record. This decision shall be binding upon Settling Defendants, subject only to the right to seek judicial review pursuant to Paragraph 8.5(h) below.

h. Judicial Review of Final Administrative Decision.

i. Any administrative decision made by EPA pursuant to Paragraph 8.5(g) shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by Settling Defendants with the Court and then served on all Parties within 10 days of receipt of EPA's decision. The motion shall include a description of the matter in dispute, the efforts made by the parties to resolve it, the relief requested[, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree.] The United States may file a response to Settling Defendants' motion.

ii. In proceeding on any dispute governed by this Paragraph, Settling Defendants shall have the burden of demonstrating that the decision of the [insert correct title] [Director of the Waste Management Division], EPA Region \_\_, was arbitrary and capricious or otherwise not in accordance with law. Judicial review of EPA's decision shall be on the administrative record compiled pursuant to Paragraph 8.5(g)(iii).

iii. If EPA prevails in the dispute, within 5 days of resolution of the dispute, Settling Defendants shall pay the amount due under the final decision plus Interest that has accrued between the date the payment was due under Paragraph 8.4 (Payment of Additional Response Costs) through the date of payment. Payment shall be made from the escrow account in accordance with the instructions in Paragraph 8.4 above. Any amounts remaining in the escrow account after payment to EPA shall be disbursed to Settling Defendants.

iv. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone, or affect in any way any obligation of Settling Defendants not directly in dispute, unless EPA or the Court agrees otherwise. Stipulated penalties with respect to the disputed payment shall continue to accrue, but payment shall be stayed pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall accrue from the date payment was originally due. In the event that Settling Defendants do not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section VII.